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In the Supreme Court of the United States

OCTOBER TERM, 1982

COMMONWEALTH OF PENNSYLVANIA, et al.,
Petitioners

v.

DELAWARE VALLEY CITIZENS COUNCIL FOR CLEAN AIR
and
UNITED STATES OF AMERICA,
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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STATEMENT OF QUESTIONS PRESENTED

1. May a court modify a consent decree to impose multi-million dollar annual obligations on defendants without holding an evidentiary hearing on disputed material facts?

2. May a court modify a consent decree to impose obligations on defendants which defendants cannot comply with as a matter of law?

3. Did the court err in refusing to modify a consent decree by not allowing implementation of federal policy underlying the program established by the decree?

TABLE OF PARTIES

DELAWARE VALLEY CITIZENS' COUNCIL FOR CLEAN AIR; AMERICAN LUNG ASSOCIATION OF PHILADELPHIA AND MONTGOMERY COUNTY; DELCHESTER LUNG ASSOCIATION; SIERRA CLUB, PENNSYLVANIA CHAPTER; FRIENDS OF THE EARTH OF THE DELAWARE VALLEY; CITIZENS' COMMITTEE FOR ENVIRONMENTAL CONTROL; KEVIN QUINN, KAYSI FARRELL, RUTH G. WEISS; JOHN KLINKNER, ELIZABETH S. BIEZ; MONA SHULMAN

Plaintiffs

v.

COMMONWEALTH OF PENNSYLVANIA; RUSSELL E. TRAIN, Individually and as Administrator of the Environmental Protection Agency; WILLIAM T. SHERLOCK, Individually and as Secretary of the Pennsylvania Department of Transportation; MAURICE K. GODDARD, Individually and as Secretary of the Pennsylvania Department of Environmental Resources; DANIEL J. SNYDER, III, Individually and as Regional Administrator of the Environmental Protection Agency, Region III

Defendants

(D.C. Civil No. 76-2068)

UNITED STATES OF AMERICA

Plaintiff

v.

COMMONWEALTH OF PENNSYLVANIA; the PENNSYLVANIA DEPARTMENT OF TRANSPORTATION and WILLIAM T. SHERLOCK, Secretary of the Pennsylvania Department of Transportation; the PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES and MAURICE K. GODDARD, Secretary of the Pennsylvania Department of Environmental Resources

Defendants

(D.C. Civil No. 77-0619)

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The Commonwealth of Pennsylvania, the Pennsylvania Department of Transportation, Thomas D. Larson, Secretary of Pennsylvania Department of Transportation, the Pennsylvania Department of Environmental Resources, and Peter Duncan, Secretary of the Pennsylvania Department of Environmental Resources petition that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit which entered in this case on March 1, 1982. The petition for rehearing en banc was denied on March 26, 1982.

I. OPINIONS OF THE COURT BELOW

The three opinions of the District Court dated May 20, 1981, June 16, 1981 and July 14, 1981 are not yet reported and are printed in the Appendix, pp. 1a-16a. The opinion of the Court of Appeals dated March 1, 1982 is printed in the Appendix, pp. 17a-43a and is reported at 674 F.2d 976 to 987 (pages 987 starting at the words "Sur Petition for Rehearing" to page 990, inclusive, have been inadvertently printed, as they apply to a separate and a later appeal involving this case). The order of the Court of Appeals dated March 26, 1982, denying a petition for rehearing en banc is not reported and is printed in the Appendix, pp. 44a-45a.

II. JURISDICTION

The judgment of the Court of Appeals was entered on March 1, 1982 and the petition for rehearing was denied on March 26, 1982. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254.

III. STATEMENT OF THE CASE

This action was commenced in July of 1976 by Delaware Valley Citizens Council for Clean Air[1] (hereinafter "Delaware Valley") against the Commonwealth of Pennsylvania and certain of its officials.[2] Plaintiff sought to compel the Commonwealth defendants to implement an emission inspection program in fourteen of Pennsylvania's 67 counties. Also named as a defendant was an official of the United States Environmental Protection Agency whom plaintiff sought to compel to have the Commonwealth defendants implement an emission inspection and maintenance program (hereinafter "I/M program").[3] Plaintiff based its complaint on the Clean Air Act of 1970, 42 U.S.C. §1857, et seq. (since amended and reclassified in 42 U.S.C. §7401 et seq.). In February, 1977, the United States commenced a second suit seeking to compel defendants to implement an emission inspection program. As a result, Delaware Valley dismissed the United States as a defendant in its action.

Both of these cases were settled by entry of a consent decree on August 29, 1978, prior to a determination of any

[1] Delaware Valley is a nonprofit corporation organized under the laws of the Commonwealth of Pennsylvania.

[2] William T. Sherlock, Secretary of the Pennsylvania Department of Transportation and Maurice K. Goddard, Secretary of the Pennsylvania Department of Environmental Resources.

[3] An emission inspection and maintenance program consists of checking the tailpipe emissions (hydrocarbons and carbon monoxide) of vehicles by means of an analyzer and requiring that vehicles which exceed a specified level of emissions have repairs performed to lower their emissions to the specified level.

of the claims on the merits (46a-66a). The consent decree provided for the emission inspection of certain vehicles in ten counties in Pennsylvania. The inspections were to be performed by private garages which opted to join the program unless the General Assembly of Pennsylvania authorized a franchise system.[4] If the emissions of a vehicle were above a set level, repairs were required to reduce the emissions. When the emissions of a tested vehicle were below the set level, a certificate of emission inspection would be placed on that vehicle. Legislation for a franchise system was not approved by the legislature. Accordingly, defendants proceeded with implementation of the emission inspection program using private garages (a decentralized system) under authority of existing legislation.

On March 7, 1980, this consent decree was modified by agreement of all parties (67a-74a). The modification extended certain attainment dates (implemenation was extended from August 1, 1980 to May 1, 1981) and provided for quarterly visits to the private inspection stations by Pennsylvania Department of Transportation personnel to check the emission analyzer, and the performance of a study to investigate monthly checks of stations. The Department of Transportation reserved the right to select the visit cycle and plaintiff reserved the right to challenge this system.

A key element of the I/M program was the type of emission analyzer to be used for the program. When the consent decree was signed, the only analyzer available was the BAR 74 category (an analyzer manufactured in compliance with prescribed specifications). Subsequently the newer and more accurate BAR 80 analyzer (ordered by the

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[4] A franchise system is a system whereby one contractor is selected to construct and to operate emission inspection stations.

district court on June 16, 1981) was developed. EPA had also begun development of a newer analyzer for this program. On September 24, 1980, EPA released their national policy statement recommending that all states with a private garage inspection program (such as Pennsylvania) use this new analyzer. The statement also provided for an extension of time to implement the program to provide for necessary design and manufacturing time. This national policy was supported by technical reports, which explained the significant benefits to the program by using this new analyzer.

Relying on this national policy of EPA and the EPA reports, Defendants began negotiations to modify the consent decree to extend the implementation date of the I/M program from May 1, 1981 to January 1, 1983 to allow the change to the new analyzer. Following lengthy negotiations EPA and defendants agreed in April, 1981 to modify the consent decree. Delaware Valley, the other plaintiff, agreed in principle, but refused to agree to the modification because defendants would not agree to the payment of $200,000 to Delaware Valley to support the other programs of Delaware Valley. Delaware Valley had also demanded reimbursement of all costs so that they could oversee the program and that the program be continued in the future regardless of any changes to Federal laws and regulations.

On April 29, 1981, defendants filed a motion to modify the consent decree and on May 1, 1981, defendants requested the district court to stay the consent decree. On May 1, 1981, Delaware Valley filed a motion to find defendants in violation of the consent decree and to modify the consent decree. On May 6, 1981, the district court Judge convened an informal conference with all parties to discuss the procedure for resolution of this matter, requested EPA to file a report by May 20, 1981 and requested

all parties to continue with negotiations to modify the consent decree. The EPA report was filed on May 20, and within hours, without permitting defendants to review or comment on this report and without any hearing or testimony, the district court denied defendants' motion to stay and to modify the consent decree, found defendants in violation of the consent decree, and ordered defendants to submit an implementation plan by June 1, 1981. In the May 20 order, the district court also denied the motion of Delaware Valley to modify the consent decree to require monthly checks of stations, use of referee stations and certification of a set number of stations. Delaware Valley did not appeal this order.

On June 1, 1981, defendants filed a motion for reconsideration of the May 20 order and the implementation plan. On June 8, 1981, plaintiffs filed their objections to the plan. Delaware Valley renewed its prior request to modify the consent decree. At the hearing before the district court on June 10, 1981, defendants objected to the modifications requested by Delaware Valley, informed the court that witnesses were present in the courtroom to testify relative to those modifications and requested an evidentiary hearing. The court refused to permit any testimony. On June 16, 1981, the district court issued an order denying the motion for reconsideration and modified the consent decree by requiring the defendants check every station on a monthly visit (an additional annual cost of about $1-2 million), certify 3,000 stations; and to use referee stations as a consumer protection mechanism.

On June 26, 1981, defendants filed a motion for reconsideration of the order of June 16. On July 14, 1981, the district court denied this motion without any opinion.

Defendants appealed these orders to the court of appeals. On March 1, 1982, the court of appeals upheld the orders of the district court, holding that the district court did not abuse its discretion in modifying the consent decree as requested by Delaware Valley and in denying the modification as requested by defendants. Defendants filed a petition for rehearing en banc. On March 26, 1982, the court of appeals denied this petition.[5]

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[5] On October 15, 1981, the Pennsylvania Legislature over the Governor's veto passed House Bill 456 which prohibited the expenditure of funds to implement the I/M program. As a result defendants were forced to cease implementation of the program. Based on this action, the district court issued an order finding defendants in contempt and ordered the withholding of Federal aid highway monies from Pennsylvania as a sanction for that contempt. On May 21, 1982, the court of appeals affirmed that order.

IV. REASONS FOR GRANTING THE WRIT

A. The Lower Court's Order Modifying a Consent Decree Without an Evidentiary Hearing Violates Due Process and Conflicts With This Court's Holding in Hughes v. United States, 342 U.S. 353 (1952)

In this case, the district court modified a consent decree in significant ways without holding an evidentiary hearing on disputed facts material to its decision. The court of appeals affirmed, holding that the modifications made by the district court were "contemplated by the decree itself" and that, therefore, no evidentiary hearing was required concerning those modifications. To the contrary, however, in light of the district court's heavy reliance on disputed facts in justifying the modifications, its refusal to hold an evidentiary hearing was a clear violation of due process and in direct conflict with this Court's holding in *Hughes v. United States*, 342 U.S. 353 (1952).

In *Hughes*, the parties entered into a consent decree which required the defendant either to sell certain stock or to deposit that stock with a court-designated trustee. The defendant chose to deposit the stock with a trustee. Subsequently, without holding an evidentiary hearing and over defendant's protest, the lower court modified the decree to require the trustee to sell the stock. This Court reversed, holding that while such a modification might be justifiable, it was inappropriate "without a hearing that included evidence and a judicial determination based on it." *Id.* at 358.

In this case, as in *Hughes*, the district court modified a consent decree without holding an evidentiary hearing. Likewise, as in *Hughes*, the modifications in this case could be justified only on the basis of "a hearing that included evidence and a judicial determination based on it." Finally, as in *Hughes*, the lower court ignored defendants' protests that an evidentiary hearing was required. Thus, the decision in this case directly conflicts with this Court's holding in *Hughes*.

This conflict exists because of the district court's heavy reliance on disputed facts to justify those modifications even if the Third Circuit was correct that the modifications made by the district court were contemplated by the consent decree. Specifically, the district court modified the consent decree, *inter alia*:

> (1) to require monthly on-site audits of auto emission inspections stations by the Commonwealth, and
>
> (2) to require the Department of Transportation to open two "referee" stations to review consumer complaints.
>
> (3) to require the Department of Transportation to certify 3,000 stations.

It based both modifications on its finding, *as a matter of fact*, that the procedures required by those modifications were more effective than those proposed by the Commonwealth. Yet, it refused to hear evidence relative to that finding. The requirement to certify 3,000 stations is not only not contained in the consent decree but the district court ordered this on the bland request of Delaware Valley.

Moreover, to the extent that the consent decree itself "contemplated" the modifications ordered by the lower

court, it did so only if, as a matter of fact, those procedures were more effective than those proposed by the Commonwealth. Thus, the consent decree provided no basis for foregoing a hearing on the disputed and material facts. To the contrary, it clearly contemplated and required such a hearing.

The due process implications of the lower court decisions should be clear. Certainly, a party is entitled to notice and a hearing before a court makes factual determinations on which it bases the imposition of multi-million dollar obligations on that party. Defendants received Delaware Valley's motion for these three modifications only 24 hours before the hearing on June 10, 1981. Nonetheless, in this case, without holding a hearing, the district court ordered modifications in the consent decree which will require the expenditure of millions of additional dollars by defendants. The additional personnel costs to check stations on a monthly basis will require an additional annual cost of from $1 to $2 million dollars.

As importantly, if a court has the power to modify consent decrees in such a way as to impose substantial additional obligations without an evidentiary hearing, and over the objections of a party, few, if any, parties will be willing to enter into such agreements. In this day of burgeoning litigation in the federal courts all methods of settlement should be encouraged. A consent decree cannot be used as a tool to cause harm. This is what Delaware Valley wants and what the court has done. See *United States v. Swift*, 286 U.S. 106 at 115.

The strong disincentive to settlement created by the lower courts, therefore, presents an issue of public importance. For that reason, and, in addition, because those deci-

sions conflict with this Court's decision in *Hughes*, this Court should grant review in this case.

B. The Court Below Ordered a Modification Which Usurps State Legislative Powers and Which Defendants Have No Power To Implement

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The district court also modified the consent decree to require that the Department of Transportation certify a minimum of 3,000 emission inspection stations for this program. The consent decree specifies that inspection will be performed by private stations that satisfy the regulations of the Department of Transportation. In order to be certified, the private inspection stations must apply for certification, purchase an approved emission analyzer, hire a certified emission mechanic and comply with other requirements. The consent decree contains no requirement for the certification of any set number of stations. The court of appeals agreed that no such explicit requirement existed.

Moreover, entrance into the program, by private stations, is purely discretionary: there is no law allowing the state to force participation. Indeed, the court of appeals acknowledged that "the Commonwealth cannot force privately-owned garages to participate in the I/M program", but called this legal impediment a "distraction" and held that the defendants must have 3,000 inspections stations in the program notwithstanding that impediment. In so doing, the court of appeals found that if 3,000 stations did not voluntarily join the program, the Department could simply establish its own inspection stations. This is a major and devastating error by the court.

There is no authority in any state law which permits the Department to establish state inspection stations. The court's solution thus requires that the State Legislature pass legislation totally altering the existing administrative and operations functions of the state agencies by establishing, operating and funding a system of inspection stations. This is a significant intrusion into the doctrines of separation of powers and federalism. See *Rizzo v. Goode*, 423 U.S. 362, 46 L.Ed. 2d 561, 96 S.Ct. 598 (1976); *Hills v. Gautreaux*, 425 U.S. 282 (1976); *Milliken v. Bradley*, 418 U.S. 717 (1974).

This modification should be reversed because it is not required by the consent decree, because defendants have no power to compel a private businessman to purchase equipment and to seek certification as an emission inspection station, and because the so-called solution by the court of appeals is contrary to the doctrines of separation of powers and federalism.

C. The Court Below Erred in Denying the Modification of the Consent Decree Requested by Defendants and in Finding Defendants in Violation of the Decree

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Defendants requested the district court to modify the consent decree to postpone the implementation date of the I/M program from May 1, 1981 until January 1, 1983 in order to use a new emission analyzer which was developed by EPA and strongly recommended by EPA. On May 20, 1981, the district court denied this motion and found defendants in violation of the consent decree since Defendants had not begun the inspection of vehicles on May 1, 1981.

In so doing, the court ignored the strong federal policy in support of defendants' requested modification, and, therefore, abused its discretion.

In this regard, an emission analyzer is the device used to measure the exhaust emissions of a vehicle and determines whether a vehicle passes or fails the inspection. When the consent decree was signed (1978) the only analyzer available was the BAR 74 analyzer. Subsequently the newer and more accurate BAR 80 analyzer (ordered by the district court on June 16, 1981) was developed.

EPA had also begun development of a newer analyzer for this program. On September 24, 1980, EPA released their National Policy Statement and recommended that all states with a decentralized inspection program (such as in Pennsylvania) use this new analyzer.[6] EPA also provided for an extension of time to implement the program because of increased design and manufacturing time needed to produce this analyzer. This national policy was supported by EPA's technical reports. Relying on this policy and the EPA reports, defendants agreed in good faith to use the new EPA analyzer and began negotiations to modify the consent decree. Negotiations were progressing, agreement was reached with EPA and agreement with Delaware Valley collapsed in late April, 1981.

Defendants and Delaware Valley agreed on the new analyzer, but did not agree on the payment of funds to Delaware Valley to support the other programs of Delaware

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[6] In November, 1981, EPA filed a report with the district court stating that EPA granted an extension of time until January, 1983, to Memphis, Tennessee to use the computerized analyzer and that Massachusetts had requested an extension of time until April, 1983 to use the EPA analyzer.

Valley. The lower court has ignored the statement in *United States v. Swift and Company,* 286 U.S. 106, 76 L.Ed. 999, 52 S.Ct. 460 (1932), that a modification is appropriate when changing circumstances have turned the decree "into an instrument of wrong". *Swift,* 286 U.S. at 115. This is precisely what Delaware Valley has done. Their actions of agreeing in principle but requiring ransom is simply a course of conduct that no Court should condone.

On May 1, 1981, Delaware Valley requested the district court to find defendants in violation of the consent decree. On May 6, 1981 the district court scheduled a conference with all counsel to discuss the status of Defendants' motion to modify the consent decree to use the new analyzer and Delaware Valley's motion to find Defendants in violation. At that conference, defendants and Delaware Valley were requested to continue to seek an amicable resolution of this matter. Then, on May 20, 1981, without any evidentiary hearing or notice to any party, the district court suddenly issued its order finding Defendants in violation of the consent decree and denying Defendants' motion to postpone the implementation date of the program to January 1, 1983 in order to use the new EPA analyzer. Defendants were found in violation of the consent decree for attempting to comply with the requests solely initiated and urged by a plaintiff in this action—the Federal Government.

The consent decree in this case had one purpose—the implementation of federal law. For the district court to refuse modifications of that decree, which were clearly important to implement the policies of the federal agency charged with enforcement of the relevant federal law, was clearly an abuse of discretion which should be reviewed by this Court.

V. CONCLUSION

For the foregoing reasons, Petitioners respectfully request that a writ of certiorari issue to review the judgment of the Court of Appeals for the Third Circuit in this case.

Respectfully submitted,

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